

**Florida's Request To Assume Administration of a Clean Water Act Section 404 Program  
(85 FR 57853, September 16, 2020) EPA-HQ-OW-2018-0640**

---

**Code 5 Enforcement**

**Florida is well-prepared to address the compliance and enforcement responsibilities of the Section 404 program**

Commenters (0223, 0429-Justin Wolfe) voiced support for FDEP's ability to adequately enforce the laws necessary to implement Florida's Section 404 program. Commenter (0223) argued that Florida has demonstrated in its application that it can fulfill the enforcement requirements of Part 233; FDEP has the "authority to stop unauthorized activity; enjoin threatened or continuing violations; assess civil penalties for 404 violations of at least \$5,000 per day of violation; assess criminal remedies for instances of willful violations or criminally negligent violations of at least \$10,000 per day of violation as well as power to seek criminal fines for knowing false statements and other similar criminal conduct in an amount of at least \$5,000 for each instance of violation." Likewise, the commenter (0223) claimed that Florida meets the Section 233.41 requirements for burden of proof and *mens rea* under state law and is well-prepared to address the compliance and enforcement responsibilities of the program. The commenter added that FDEP has been enforcing Florida's dredge and fill regulations for nearly 50 years and has proven compliance and enforcement protocols in place. Commenters (0223, 0429-Justin Wolfe) explained that the recently-enacted Environmental Accountability has increased the civil penalty for Section 404 violations to three times the amount allowable under Section 233.41. One commenter (0223) highlighted FDEP's independent Environmental Crimes Unit, consisting of 18 sworn law enforcement officers who are deployed throughout the state to investigate and enforce criminal violations of Florida's environmental laws. The commenter (0223) added that these officers work closely with Florida's many other law enforcement agencies, such as county Sheriff's departments and the state Fish and Wildlife Conservation Commission officers, and with FDEP's dedicated staff of scientists, engineers, and environmental professionals that will administer Florida's Section 404 program. The commenter (0223) also stated that when arrests are made, one of Florida's 20 State Attorney's offices coordinate with FDEP's district offices and Office of General Counsel to prosecute the case in criminal court.

**FDEP is not adequately enforcing its current programs and thus should not be granted the power to oversee another program**

Commenters (0026, 0346, 0408, 0369, 0430-Alison Kelly) emphasized FDEP's record, which shows an inability and/or unwillingness to enforce the law under Florida's CWA 404 program. One commenter (0430-Alison Kelly) declared that FDEP "does not currently do meaningful enforcement of its own permits and programs, including the Environmental Resource Permit program" and questioned how it would enforce Section 404 requirements. The commenter noted that FDEP was enforcing fewer cases than in the past. Commenter (0026) exclaimed that FDEP's enforcement efforts were ineffective and that FDEP has done nothing to enforce clean up. The commenter noted that, instead of cleaning up impaired waters, FDEP merely added the area to

the Section 303(d) list required under the Clean Waterways Act. Commenter (0346) reported that “the number of enforcement cases opened by Florida’s existing dredge and fill program dropped by 36% from 2018 to 2019” and that “FDEP only assessed penalties in 342 of the 3,774 instances of noncompliance and only collected 44% of the penalties assessed.” This commenter concluded that “FDEP is not adequately enforcing its current programs and thus should not be granted the power to oversee yet another program.” Another commenter (0408) affirmed this sentiment, stating that FDEP has failed to adequately enforce current environmental regulations. This commenter (0408) observed that “according to DEP’s own reporting, 80% of the state of Florida waterways are considered degraded” noting also that: “FDEP is sorely behind in the development of TMDLs and BMAPs for impaired waterbodies across the state, [and that] FDEP-established BMPs for stormwater and agriculture are not meeting their intended pollution reduction goals.” This commenter (0408) agreed with other commenters in concluding that “additional responsibilities will divert resources away from these critical pre-existing duties.” Another commenter (0369) echoed these concerns, stating that Florida removed almost all enforcement of their ERP permits since 2011. Commenters (0356, 0543, 0430-Alison Kelly) observed that FDEP’s ability to enforce of Florida’s environmental laws has been weakened by recent Florida legislative and administrative actions, and that, under former Governor Rick Scott, “senior staff of the FDEP were dismissed, enforcement was restrained, and prosecutions and fines reduced.”

Commenter (0386) repeated the claims of other commenters (0346, 0408, 0356, 0543, 0430-Alison Kelly) that “FDEP’s enforcement record continues to demonstrate an incapacity to adequately enforce existing programs, much less adopt new ones.” This commenter concluded that: “Year after year, analyses of FDEP’s enforcement record have demonstrated an inability or unwillingness to meet enforcement obligations, ensure compliance with existing programs, and ultimately provide requisite protection to the State’s valuable natural resources.”

#### **Multiple deficiencies in FDEP’s enforcement program prevent it from enforcing the Section 404 program in a manner equivalent to the existing federal standard**

Commenter (0386) pointed out multiple examples of deficiencies in FDEP’s ability to properly enforce the Section 404 program in a manner equivalent to the existing federal standard, including: the ongoing failures in FDEP’s enforcement record, inadequate enforcement authority, less stringent state criminal liability, and inadequate opportunities for public participation in enforcement, concluding that these examples demonstrate FDEP’s “incapacity to adequately enforce existing programs, much less adopt a new one.” The commenter (0386) provided an example of a 2016 analysis by the group “PEER” showing how enforcement actions during the previous year decreased. This commenter (0386) also noted that Florida’s submission “fails to adequately describe the state’s compliance evaluation and enforcement programs” and that “Florida also fails to address how the state will coordinate enforcement strategy with the Corps and EPA, as required under 40 C.F.R. § 233.11(g).”

Commenter (0386) observed that, although the “General Counsel claims that Florida law is consistent with and no less stringent than the Clean Water Act enforcement requirements,” FDEP may lack adequate staffing and resources to properly administer and enforce a Section 404 program. This commenter (0386) called attention to the fact that Florida law regarding criminal

enforcement is not as stringent as federal law, in that Florida law requires proof that the discharge “caused actual harm or injury to human health or welfare, animal, plant, or aquatic life or property.” This commenter (0386) further noted that, “under Florida law, it is unconstitutional to criminally penalize “mere negligent conduct” because that fails to provide “clearly ascertainable standards of guilt by which a citizen may gauge his conduct.”” This commenter observed that, “because criminal negligence in the state statute is a higher level of intent than simple negligence in the Clean Water Act, the Florida Statute conflicts with federal law, and does not provide as stringent criminal enforcement as does federal law.” This commenter (0386) also pointed out that Florida law provides for shorter statutes of limitation (1 to 3 years) for enforcement of environmental crimes than the 5-year period under federal law, making its program less stringent than the federal one. The commenter (0386) concluded by stating that “there is nothing in the Clean Water Act that authorizes the EPA to approve a state program with an enforcement scheme that is less stringent than the federal one in terms of criminal culpability, burden of proof and statutes of limitations. To the contrary, these failures render the program non-approvable.”

Commenter (0386) also noted that Florida’s program was deficient in public participation. The commenter indicated that, while 40 CFR 233.41(b)(1) requires the state provide for public participation, the General Counsel provides a blanket statement that the state has “authority” to comply with these requirements without citing any law or regulation providing that authority. Commenter (0386) also observed that, while the memorandum of agreement states that “FDEP shall provide for public participation in the State 404 Permit Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2),” FDEP “has failed to identify any requirement in the state law or regulations to ensure compliance with the requirements of 40 C.F.R. § 233.41(e)(2).” The commenter (0386) questioned the extent to which the public is able to enforce the public participation obligations when such obligations are not incorporated into state law.